STATE OF HAWAII
2011 REAPPORTIONMENT COMMISSION
NOTICE OF REAPPORTIONMENT COMMISSION MEETING

IN RECESS UNTIL 10/13/11
4:00 pm Room 329

Date: Wednesday, October 5, 2011
Time: 2:00 PM
Place: State Capitol, Conference Room 329
415 South Beretania Street
Honolulu, Hawaii 96813

AGENDA

I. Call to Order – Chair

II. Roll Call and Determination of a Quorum

III. Approval of Minutes for meeting of September 26, 2011

IV. Public Testimony – Any interested person may submit data, views or arguments on any agenda item

V. Input from Advisory Councils - Discussion and action, if appropriate

VI. Senate Staggered Terms – Correction to Senate Staggered Terms approved at the September 26, 2011 meeting – Deliberation and decision-making

VII. Executive Session
Pursuant to HRS §92-5(a)(4) to consult with the Commission's attorney concerning the Commission's powers, duties, privileges, immunities and liabilities regarding population base, permanent residents and prior case law regarding reapportionment and redistricting

VIII. Adjournment

THE COMMISSION MAY ELECT TO CONSULT WITH COUNSEL IN EXECUTIVE SESSION PURSUANT TO SECTION 92-5, HAW. REV. STAT. IF YOU REQUIRE SPECIAL ASSISTANCE OR AUXILARY AIDS AND/OR SERVICES TO PARTICIPATE IN THE PUBLIC HEARING PROCESS OF THE REAPPORTIONMENT COMMISSION, PLEASE CONTACT THE OFFICE OF ELECTIONS AT LEAST 48 HOURS PRIOR TO THE HEARING SO ARRANGEMENTS CAN BE MADE. FOR FURTHER INFORMATION, PLEASE CALL THE OFFICE OF ELECTIONS AT 453-8683 OR 1-800-442-8683 FROM THE NEIGHBOR ISLANDS.

STATE OF HAWAII
2011 REAPPORTIONMENT COMMISSION

MINUTES OF THE REGULAR MEETING OF THE
2011 REAPPORTIONMENT COMMISSION

September 26, 2011
2:00 pm

State Capitol, Room 329
Honolulu, Hawaii 96813

Commissioners Present:

Victoria S. Marks, Chairperson
Calvert Chipchase, IV
Clarice Y. Hashimoto
Harold S. Masumoto
Elizabeth Moore
Dylan Nonaka
Lorrie Lee Stone
Anthony P. Takitani
Terry Thomason

Technical Staff Present:

Robyn Chun, Department of the Attorney General
Judy Gold, Office of Elections
Royce Jones, ESRI
Caryn Moran, Office of Elections
Scott Nago, Office of Elections
Rex Quidilla, Office of Elections
David Rosenbrock, Office of Elections
Rhowell Ruiz, Office of Elections
Aaron Schulaner, Office of Elections
Karen Tam, Office of Elections
Lori Tomczyk, Office of Elections
Charles Wong, Office of Elections

Observers Present:

Julia Allen, Office of Senator Sam Slom
Nancy Davlantes, Common Cause
Representative Cindy Evans, State House
JoAnne Georgi, Kauai Advisory Council

Senator Josh Green, State Senate
Glenn Ida, Oahu Advisory Council
Nanea Kalani, Civil Beat
Nikki Love, Common Cause Hawaii
Amy Monk
Randall Nishimura, Kauai Advisory Council
Ethann Oki, Office of Senator Malama Solomon
Michael Palcic, Oahu Advisory Council
B.J. Reyes, Honolulu Star-Advertiser
Senator Pohai Ryan, State Senate
Linda Smith, Oahu Advisory Council
Tom Smyth, Military Officers Association of America
Representative Clift Tsuji, State House
Shannon Wood
Keanu Young, Office of Representative Marilyn Lee

I. Call to Order

Chairperson Marks called the meeting of the 2011 Reapportionment Commission to order at 2:07 pm. Chairperson Marks noted that the maps were available in the back of the room and she thanked Olelo for being present.

PROCEEDINGS

II. Roll Call and Determination of Quorum

Roll call was taken and all Commissioners were present.

III. Approval of Minutes

Chairperson Marks moved to approve the minutes of the September 23, 2011 meeting. Commissioner Hashimoto seconded the motion with no objections from the nine commissioners present.

IV. Public Testimony – Any interested person may submit data, views or arguments on any agenda item

Oahu Advisory Council Member Smith testified that she observed reapportionment in 1991 and 2001, and that Commission members deserved credit for their openness and the way they handled their duties, even though not everyone agreed with the outcome. She commented that it was a much improved process this year and that she hoped it would be continued by the 2021 Commission, especially the egalitarian treatment of participants. She stated that

there was a lot of time, effort, and angst spent on the definition of permanent residents. She said the definition should be resolved and a process put in place so that in 10 years, the next Commission could focus on its primary tasks of reapportionment and redistricting. She said the divisiveness of the permanent residents issue was unfortunate and pitted people against friends and islands against one another, and that she hoped this situation would be avoided in the future. She emphasized that the Legislature had not acted on the recommendations of previous Commission to define permanent residents but should act now. She stated that the Oahu Advisory Council would include this in their recommendations to the Commission, that the councils on other islands should forward similar recommendations to the Commission regarding action needed by the Legislature, and that the Commission itself should make the same recommendation to the Legislature. She stated that the recommendation to the Legislature should come from as many voices as possible so future Commissions could focus on their core responsibilities.

Mr. Dame asked if it would be possible to turn on some of the features in the online software because he was not able to manipulate data, and that he talked to others who had problems with the software. Project Manager Rosenbrock stated that only the "Submit" button on the mapping software had been turned off, although there were problems over the weekend with the State server that appeared to be resolved. Mr. Jones stated that nothing was changed but that he would check the program again.

Mr. Dame testified that he was troubled by the Commission's actions to establish the population base. He stated that the Commission was supposed to report the population of each county to determine each county's share of legislative seats, but that the population count reported for Oahu was not agreed to by Maui, Kauai and the Big Island. He stated that he believed Commissioners recognized that about 100,000 people did not qualify as permanent residents under the meaning of that term, and that whether or not Commissioners liked the term, he believed they were unable to locate enough of the 100,000-plus persons for extraction in order to allot the Big Island a seat that it deserved. He stated that he understood that people tried to work out a compromise but that he did not believe the Commission could say in good faith that apportionment of seats reflected the actual permanent resident population. He said it seemed to him that whenever the Commission found ambiguity in population data, the body erred on the side of inclusion and used every excuse to not extract the military.

Mr. Dame noted that after the Commission received the Attorney General's letter, the Commission realized it had to change and revote its original motion; otherwise the original motion was too blatantly unconstitutional and had to be amended. He stated the smallest adjustment the Commission could make was

Extraction A and that the extraction was fewer than the number necessary to shift a seat to the Big Island. He said in comparing the approximately 16,000 persons extracted to the 100,000-plus possible persons that any reasonable person would agree were actually nonresidents of Oahu, he thought the gap was too great.

Referring to an expression used in tennis, Mr. Dame stated that the trouble he had was that people from Oahu were "calling the balls [in or out] on their side of the court," but were not doing so with the kind of honesty that he thought was necessary. He said the process was muddled and had stumbled, ending up with a result that he did not think reflected the accurate proportion of the permanent resident population in the counties. He questioned how accurate the methodology had to be to extract persons, noting there was a great deal of concern about issues such as extracting registered voters from military areas. He stated that the Commission insisted that extraction be extremely accurate.

Mr. Dame commented that the Commission was balancing a claim from the Big Island that their political power would be diminished if they did not get fair treatment in the Commission's adjudication, but that it was absent and they got lip service. He stated that people required [certainty] almost beyond a reasonable doubt that the Commission was not excluding too many people and so it was not possible to have a discussion. He questioned that if the Commission did not follow the assumption used in the past that 98 percent of dependents were nonresidents, what was the percentage, such as 95 or 90 percent, that would give the members confidence in the extracted number.

Mr. Dame stated he was sorry if there was a harsh edge to his remarks but that when he loses on a political issue, that is how he knows he is right. He said he thought the Commission had stumbled and that the matter may have to be decided by a court. He acknowledged that the court might err on the side of giving deference to the Commission, but that in his view, the Commission fell short in following the letter of the law.

Chairperson Marks stated she did not agree with Mr. Dame's comments on the thought processes of the Commission members.

Oahu Advisory Council Chair Palcic testified that just as there was difficulty with defining the term permanent resident, there was also a problem defining the term reasonable person as used by Mr. Dame, because any reasonable person would not necessarily exclude all the military for reapportionment counts for the island of Oahu and the State of Hawaii. He added that no other state excludes the military population in that manner and that if Hawaii did so, they would have no representation in any legislature in the country. He stated there were many

reasons to include the military population and any reasonable person would welcome that.

He commented that population growth on the Big Island allowed the island to maintain its current representation and that if the island's population had not grown since 2001, it would likely lose some representation in the Legislature. He stated his view that the population of other islands also grew during that period and that the Big Island did not grow enough to gain seats in the Legislature.

Oahu Advisory Council Chair Palcic commended the Commission on their openness, and stated that it was true the body allowed input from anyone in the public who cared to speak, and that no one was prevented from saying their views; however, that another aspect of the Commission's operation, the actual drawing of district lines, was an opaque process. He described the example of his recent submission of a plan to place St. Louis Heights in the same district as neighboring areas of Kaimuki, which was not discussed by the Commission and was not included in the plan. He stated that he was never given a reason not to accept this proposal and that in the future, the Commission should develop a process for the public to have input during the process or at least allow the public to observe the tradeoffs and considerations that went into making decisions and see how lines are actually drawn. He stated that part of the process was a great mystery to him and, he believed, to some members of the Commission. He concluded by stating it was a pleasure to serve as the chair of the Advisory Council for Oahu and thanked the Commission for the opportunity to work on reapportionment.

Chairperson Marks noted that Oahu Advisory Council Chairman Palcic's latest maps used in his testimony were submitted after the close of the public comment period and while his view was that it was a reasonable alternative, it split up another community so it might not be viewed as reasonable by others. Mr. Palcic stated that under the current plan, part of Kapahulu is split and part is not split, but that under the plan he submitted, the main artery of Kapahulu Avenue provided a boundary.

V. Input from Advisory Councils – Discussion and action, if appropriate

Kauai Advisory Council Chairperson Nishimura stated the Council reviewed the maps and is in concurrence with the Commission's plan. He stated that the Commission did a good job in carrying out their duties. He added that the definition of permanent residents should be addressed by the Legislature so that the next Commission would not have to spend time on the population issue and instead could concentrate on the tougher tasks of reapportionment and redistricting.

VI. Technical Committee's Revised Redistricting Plans – Deliberation and decision-making on the Revised Plans presented at the September 23, 2011 meeting

Chairperson Marks moved that the Commission adopt the Congressional plan as recommended by the Technical Committee. Commissioner Nonaka seconded the motion with no objections from the nine commissioners present.

Chairperson Marks moved that the Commission adopt the recommended plans for the State Senate and the State House districts as proposed by the Technical Committee. Commissioner Hashimoto seconded the motion and discussion followed.

Commissioner Moore stated that she would vote for the State plan, although they were based on Extraction A and she was opposed to any extraction because she still had concerns with federal constitutional issues. She said she felt she did not have a clear understanding of the definition of permanent residents and that reasonable people can come to different conclusions about the meaning. She reiterated that she previously urged the Commission to recommend action by the Legislature regarding the definition of permanent residents to help future reapportionment efforts. She said that the Commission spent over two months very reasonably trying to extract the military population as provided by the State Constitution but that she would accept the recommended plan after noting her reservations. She said she was opposed to the extraction of 15,000 to 16,000 persons in barracks including large minority populations, which raised her concerns about conflicts with the U.S. Constitution.

Commissioner Takitani stated that the Commission had made the choice to support known nonpermanent residents over known permanent residents. He asked that the record reflect his opposition to the Big Island Senate plan, Oahu Senate Plan, and Oahu House plan.

Commissioner Nonaka stated that he also had concerns about the permanent resident population base. He stated that the Commission's recommendation to the Legislature to define permanent residents should also urge the legislation include a process for determining permanent or nonpermanent status. He said the Commission heard many opinions as to what permanent resident status should be and there were other classes of nonpermanent residents beyond military and students, such as snowbirds (part-time residents), temporary contract workers, those with green cards, traveling nurses, and others. He added that it was important to have a means of identifying who should be extracted and how to extract them from the census population since the population adjustment

was just as significant an issue as actual reapportionment. He noted that the U.S. Census data is based on the "usual residence" as its definition of whom to count and is used for congressional reapportionment, but the State process is not clear if the Commission has to do something contrary to the federal process. He added that the State of Kansas laws identify persons to be counted or extracted and procedures for counting and extraction.

Commissioner Nonaka said he would support the plan and again thanked the staff and Technical Committee members for their work. He stated that the plan was not perfect but represented a lot of thought and effort by members, and that the Committee considered and accommodated as much public input as possible in developing plans.

The motion carried with no objection by all commissioners except Commissioner Takitani, who said he was voting "No" on portions of the plan for Big Island Senate, Oahu Senate, and Oahu House, and "Yes" for the remainder of the plan.

Chairperson Marks moved that the Commission authorize the staff to make housekeeping, nonsubstantive, and technical corrections to maps and metes and bounds descriptions. Commissioner Nonaka seconded the motion with no objections from the nine commissioners present. Commissioner Nonaka clarified and confirmed with Project Manager Rosenbrock that these were changes to make the House and Senate lines to coincide in areas where there is no population.

VII. Executive Session

Chairperson Marks moved that the Commission go into executive session. Commissioner Nonaka seconded the motion with no objections from the nine commissioners present.

The Commission went into executive session at 2:32 pm.

Reconvene of Meeting

The Commission returned at 2:53 pm. Chairperson Marks moved to go into regular session. Commissioner Moore seconded the motion with no objections from the nine commissioners present.

Mr. Jones presented an overview of extraction, the method of equal proportions used to determine the number of seats per basic island unit, allocation of seats pursuant to the Commission's decision not to form canoe districts, and allocation of seats within each basic island unit pursuant to the case *Burns v. Gill.* Mr.

Jones noted that statewide, the deviation was 9.37 percent which was within the 10 percent allowable deviation between the highest and lowest deviation. The presentation, also including an overview of previous presentations, was posted on the Reapportionment website.

Mr. Jones presented calculations used to determine Senate staggered terms beginning with the 2012 Elections. He explained that staff identified the population in all census blocks according to whether or not they held Senate elections in 2010, then determined the populations that held Senate elections in 2010 in Senate district lines shown in the new plan. He stated staff identified 12 Senate districts in the 2011 plan that had the lowest rate of participation in 2010 Senate elections; those 12 districts will have two-year Senate terms in 2012. He stated that there was a 92.1 percent match rate of population whose Senate district was the same in 2010 as in the new plan. This information was also posted on the Reapportionment website.

Chairperson Marks moved that the Commission adopt work by the staff for Senate staggered terms for 2012. Commissioner Stone seconded the motion with no objections from the nine commissioners present.

Responding to an earlier question as to whether the mapping website was still active, Mr. Jones stated that there were website problems over the weekend but those were resolved and the website was active. He stated that users could still work with maps online, although it was no longer possible to submit plans. Commissioner Nonaka asked how long the website would be available for use. Project Manager Rosenbrock responded that it would be available for a brief time.

Commissioner Masumoto asked for confirmation that Senate District 24 was the *only district with a Senate* election in 2010, 2012, and 2014, and that other districts with Senate contests in 2010 and 2012 would have four-year terms after the 2012 Elections. Mr. Jones confirmed both situations were correct.

VIII. Adjournment

Chairperson Marks moved that the meeting be adjourned. Commissioner Nonaka seconded the motion, which carried with no objections from the nine commissioners present.

There being no further business, the meeting was adjourned at 3:00 pm.

Respectfully submitted,

Scott T. Nago
Chief Election Officer
Secretary to the Reapportionment Commission

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) pursuant to section 92F-42(18), HRS. This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requester: Larry Geller
Board: Reapportionment Commission
Date: October 4, 2011
Subject: Adequacy of Agendas; Permitted Interaction Group (S INVES-P 12-1)

Request for Investigation

Requester asked for an investigation into whether the Reapportionment Commission violated the Sunshine Law (1) by discussing items that were insufficiently noticed on its agendas for July 12 and 19, 2011, (2) by adding an item to its agenda by vote of 2/3 of its members at its June 28 meeting, and (3) by members' participation in its Technical Committee.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's e-mail correspondence dated July 20, 2011 and attached materials; a letter from Commission Chairperson Victoria S. Marks, Esq., dated July 24, 2011; an e-mail from Chairperson Marks dated August 8, 2011; and the agendas, minutes, and testimony for the Commission's meetings through August 3, 2011[1], accessed on the Commission's website at http://hawaii.gov/elections/reapportionment/.

[1] OIP notes that the Technical Committee's work was ongoing as of the time Requester sought OIP's opinion and at the time OIP asked the Commission for its position on the issues raised (Requester's original request to OIP was made July 20; OIP's letter

Opinion

I. The July 12 agenda included several item descriptions that were too vague to notify the public of what, if anything, would be discussed under that heading. However, the minutes from that meeting show that the only topic actually discussed under those vague headings—inclusion of the military in the permanent resident population and the permanent resident population generally—was listed elsewhere on the agenda as an executive session agenda item. Thus, although the vague agenda items by themselves did not give sufficient notice to allow the Commission's discussion of any topic, the public had notice from the executive session agenda item that this topic was coming before the Commission for its consideration at the meeting, so in this specific instance, the discussion did not violate the Sunshine Law. See HRS § 92-7 (1993).

The July 19 agenda item, although less informative than it might have been, was legally adequate as notice to the public to allow the board's discussion of the item. See id.

II. The issue of which categories of persons should be included in the permanent resident population was both of reasonably major importance and affecting a significant number of persons, and as such would not have been a suitable item to be added to an agenda by a 2/3 vote of all members to which the Commission was entitled. See HRS § 92-7(d). However, the agenda as filed already listed that topic. The filed agenda described the topic as the subject of a report, and the Commission's vote to add it was apparently made under the belief that the agenda should have specified that the Commission would take action on that topic; however, a board's consideration of an item implicitly includes the possibility of board action on the item. Thus, in this particular case, the Commission's vote to add the permanent resident population issue to the agenda was not necessary to allow the Commission to consider and take action on the issue. The Commission's vote on the issue did not violate the Sunshine Law because the action taken fell within the scope of an already noticed agenda item.

III. The Technical Committee was formed as a permitted interaction group under section 92-2.5(b)(1), HRS. The Commission voted to allow substitution of other members for the original Technical Committee membership, and the status of the Technical Committee's work was listed as a topic on multiple agendas over a two-month span. However, the Technical Committee's gatherings did not include substitution of members nor did the Committee make multiple reports back to the Commission; only the members originally appointed to the group participated in the group and the Technical Committee did not present a substantive report to the Commission until the last meeting reviewed by OIP. Despite the confusion created by the Commission's agenda listings and vote to allow substitutions, in the specific circumstances before OIP the manner in which the Technical Committee actually operated was consistent with the requirements of the permitted interaction and thus in compliance with the Sunshine Law.

---

asking the Commission for a response was dated July 21; and OIP's e-mail asking the Commission for clarification of one specific point was dated August 4). This opinion is given only as to meetings occurring prior to August 4, as the Commission has not been asked or provided an opportunity to give its position regarding events after that date.

Statement of Reasons for Opinion

I. Vague Agenda Listings

Requester complained that the Commission's agendas failed to adequately describe the topics to be considered by the Commission in several specific instances. The Sunshine Law requires a board's notice of meeting to "include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated." Haw. Rev. Stat. § 92-7(a) (1993). More specifically, "the Sunshine Law requires an agenda for a public meeting to be sufficiently detailed so as to provide the public with reasonable notice of what the board intends to consider. The statute's notice requirement is intended to, among other things, give interested members of the public enough information so that they can decide whether to participate in the meeting." OIP Op. Ltr. No. 03-22 at 6.

A. July 12 Agenda

First, Requester complained that item VIII from the Commission's July 12 agenda was too vague to allow the public to determine what would be considered. Item VIII was as follows:

> VIII. Update on matters from Reapportionment staff. Commission discussion and action, if appropriate, regarding those matters.

This agenda item, by itself, does not state any subject matter that the Commission will consider, and thus this item by itself would not allow the Commission to discuss anything. OIP notes that in addition to the item Requester complained of, the July 12 agenda had similarly vague descriptions for two other reports to be given by the Advisory Councils and the Technical Committee (which is the subject of further discussion, below). Indeed, the only topic listed for the public portion of meeting that actually included a subject matter to be discussed was "Constitutional and statutory criteria and technical specifications for public submission of proposed redistricting plans."

The agenda for the executive session portion of the meeting, however, included three items for which an actual topic was stated: "legal issues regarding population base, permanent residents and prior case law regarding reapportionment and redistricting," "possible advisory council litigation concerning the reapportionment commission's decision to include military personnel and their dependents in the population base," and "filling staff positions[.]"

The meeting minutes for July 12 indicate that the Commission did not discuss anything (and no reports were made) under the agenda headings of reports from the advisory councils and the Technical Committee. Under the heading of "Update on matters from Reapportionment staff," the Commission discussed its staff's efforts to obtain more

information about where non-residents who might be counted in the permanent resident population live, especially those connected with the military, and discussed the permanent resident issue generally. The minutes indicate that there was extensive public testimony, both oral and written, on the topic of the status of non-residents in reapportionment.

A topic's inclusion on a board's agenda gives notice that the board may consider that issue at that meeting, but neither the notice provision nor any other provision in the Sunshine Law restricts consideration of agenda items to a certain order or prohibits the consideration of an agenda item at multiple points during the course of the meeting. See HRS § 92-7. OIP thus generally recognizes the ability of a board's chair to dictate the course of discussion of agenda items, including taking agenda items out of order, recessing discussion of an agenda item then returning to that discussion at a different point during the meeting, and reconsidering items in accordance with its rules and the meeting rules of general application. For this reason, although agenda item VIII by itself did not provide adequate notice of any topic to be considered by the board, the board could still have considered matters under this agenda heading so long as the matters were adequately noticed elsewhere on the agenda.

In particular, two of the items listed in the executive session portion of the agenda—"legal issues regarding population base, permanent residents and prior case law regarding reapportionment and redistricting," and "possible advisory council litigation concerning the reapportionment commission's decision to include military personnel and their dependents in the population base"—appear to reasonably cover the topics the Commission discussed under the heading of "Update on matters from Reapportionment staff" during the public portion of the meeting. The executive session agenda items described the permanent resident issue in the context of litigation and legal issues, which raises the question of whether members of the public might have been led to believe that the Commission would consider only legal issues relating to the nonresident issue. However, the public testimony received by the Commission for that meeting was largely focused on the permanent resident issue in general and was not limited to its legal ramifications, which indicates that the broader permanent resident topic was generally understood to be on the table for consideration at the meeting.

OIP therefore concludes that although the July 12 agenda was undoubtedly confusing in that it included multiple items for which no description of the topic was given, and although the issue of inclusion of non-residents in the permanent resident population was not clearly described as it might have been, the agenda, on the whole, gave enough notice to inform the public that the permanent resident issue would be considered during the meeting, and thus allowed the Commission's discussion of the issue. The Commission's discussion of the permanent resident issue during the agenda item, "Update on matters from Reapportionment staff," therefore, did not violate the Sunshine Law based on the specific circumstances presented.

B. July 19 Agenda

Requester complained that item X from the Commission's July 19 agenda, noticed for executive session, did not include a subject matter. Item X was listed as follows:

> X. Pursuant to HRS § 92-5(a)(2) relating to filling staff positions as consideration of matters involving privacy will be involved.

A topic that a board expects to consider in executive session must be listed on the agenda in the same manner required for a topic to be considered in open session. See HRS § 92-7(a). In addition, where the board anticipates going into executive session for an item, its agenda must note that the item is anticipated to be held in executive session and must list the purpose for the anticipated executive session. Id.

In this case, the agenda listed the item as an executive session item and listed the executive session purpose both by statutory citation and by description. The item did identify a subject matter, "filling staff positions." The listed subject matter could have been described better if this agenda item had specified the staff positions to be filled; however, assuming that the Commission's discussion during the executive session was, in fact, of applicants or potential candidates for staff positions, the topic "filling staff positions" did at least minimally meet the Sunshine Law's requirement that the agenda notify the public of what would be discussed. Based on the specific facts of this case, therefore, OIP finds no violation arising from item X of the Commission's July 19 agenda.

II. Adding an Item to the June 28 Agenda

Requester complains that the Commission added the subject of the permanent resident population to its June 28 agenda at its June 28 meeting by a vote of 2/3 of the Commission's members, denying the public the opportunity to prepare and submit testimony on the issue. Requester argues that this topic should not have been added to the agenda at the meeting in this manner because of its high importance and controversial nature.

The June 28 agenda as originally filed included the following item:

> V. Report from Hawaii Advisory Council
> - What should be included in permanent resident population
> - Active duty military
> - Military dependents
> - Students
> - Sentenced Felons

Requester provided his transcription of the relevant portion of the June 28 meeting, made from the 'Olelo video of the meeting starting at 54:57, quoting Chairperson Marks as follows:

> Two items. In terms of discussion and action if appropriate regarding the issue of permanent resident population was not specifically on the agenda – through my oversight – and I think it had been on the agenda for the past couple of meetings. It's even been reported by a couple of news organizations that we're going to be deciding that question today, and so at this point I would at least make a motion to amend the agenda so that discussion and action as appropriate regarding permanent resident population can be taken up. That's the first part of my motion. The second part is that we also specifically maybe have it on the agenda of our next meeting to then either further discuss or ratify whatever we might have done today.

The Commission members present voted unanimously in favor of the addition.

The Sunshine Law allows a board to add an item to its previously filed agenda with "a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons." HRS § 92-7(d). Based on those criteria, OIP finds that the issue of which categories of persons should be included in the permanent resident population was not a suitable item to add by a 2/3 vote, because OIP finds that this issue was both "of reasonably major importance" and "will affect a significant number of persons." However, the propriety of the Commission's agenda addition is ultimately irrelevant because the subject matter of the Commission's proposed addition was already adequately described in the originally filed agenda under agenda item V, the Hawaii Advisory Council's Report regarding categories of persons to be included in the permanent resident population. As OIP has previously stated,

> Although a board may choose to give notice of its intent to take action on an item, the Sunshine Law's notice provisions contain no requirement that an agenda specifically notice that action will be taken. Section 92-7(a), which contains the Sunshine Law's general notice provision, only requires a board to list all items "to be considered."

OIP Op. Ltr. No. 07-06 at 3. OIP has further concluded that "the term 'consider' must ordinarily be interpreted to include possible decision-making on the item." Id. at 4. Thus, it is the subject matter description of the item on the agenda that is critical, rather than the anticipated action, such as "report" or "for board action," because a board's consideration of an item includes the possibility of any reasonable board action on that item. And as discussed above, a board can discuss an agenda item at any point in the meeting and is not limited to the chronological order set forth in the agenda.

Although the description of item V as being part of a report may have caused some confusion, OIP believes that this description nonetheless gave legally adequate notice that the board would consider whether the listed groups should be counted as part of

the permanent resident population. The Commission's effort to add "action as appropriate regarding permanent resident population," therefore, was not necessary to allow the Commission to consider that topic, including taking action on the topic. Thus, the Commission's discussion and action on that topic did not violate the Sunshine Law in the specific circumstances presented.

III. Technical Committee

Requester questioned whether the Commission's "Technical Committee" was formed and operated in compliance with the Sunshine Law.

The Technical Committee was formed at the Commission's May 4 meeting. Although the minutes for that meeting do not specify whether the Technical Committee was intended to be a regular or standing committee, or an investigative group formed under a permitted interaction, the Commission clarified to OIP that the Technical Committee was formed as a permitted interaction group under section 92-2.5(b), HRS.

At the May 4 meeting, four named members were appointed to the Technical Committee, i.e. less than a quorum of the Commission's membership. At that same time, the Commission specifically voted to allow other Commission members to attend Technical Committee meetings in the place of the named members. However, according to the Commission, the Technical Committee's gatherings did not at any time include a member other than the appointed four members. Instead, when a Technical Committee member had a scheduling conflict, the other three appointed members met alone.

At the Commission's May 11 meeting, the topic of "Discussion and appropriate action, if necessary, re: the Technical Committee role" was on the agenda, and the minutes reflect that the full Commission discussed the timeframe and general manner in which the Technical Committee would operate.

At the May 24 meeting, the topic of "Discussion and appropriate action, if necessary, on the status of work for Technical Committee" was on the agenda, and the minutes reflect that the full Commission discussed when the Technical Committee would begin meeting.

At the June 9 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical committee" was on the agenda, and although the Commission did not discuss anything at that point in the agenda, the minutes reflect that later in the meeting, the Commission discussed ways to make the Technical Committee more accessible to the public and added "the redistricting for the US House of Representatives, and both the State Senate and House of Representatives" as an additional item to be investigated and reported on by the Technical Committee. The minutes indicate that the Technical Committee had not yet begun meeting and would not begin its work until an unspecified contract was signed.

At the June 28 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee" was on the agenda. The minutes do not reflect any

substantive discussion by the Commission, merely stating, "Chairperson Marks stated that after this meeting, the Technical Committee will begin their work and come up with a meeting schedule."

At the July 12 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee" was on the agenda. The minutes do not reflect any substantive discussion by the Commission, merely stating that "Commissioner Nonaka noted the Technical Committee is scheduled to meet on July 13, 2011."

At the July 19 meeting, the topic of "Discussion and action, if appropriate, on status of work for Technical Committee regarding proposed Congressional and/or State Senate and/or State House redistricting plans" was on the agenda. The minutes reflect that the Technical Committee members reported that they had met the previous week and would meet several times over the next two weeks, and that they expected to complete their work on time. The minutes do not reflect any discussion of the substance of the Technical Committee's work.

At the August 3 meeting, the topic of "Proposed Redistricting Plan(s) – Presentation of findings and recommendations of the Technical Committee – Deliberation and appropriate action, if any" was on the agenda. The minutes reflect that the Technical Committee gave a substantive report on the draft plans it had created. The minutes do not indicate that the full Commission deliberated on or made any decision on the plans presented by the Technical Committee.

A permitted interaction group under section 92-2.5(b), HRS, is not a standing committee[2], but instead represents a special circumstance in which members of a board subject to the Sunshine Law are specifically permitted to discuss board business outside of a board meeting. OIP discussed the Sunshine Law's requirements for an investigative task force of this sort in OIP Opinion Letter Number 07-06:

> The "investigation" permitted interaction, which the Board referred to as the basis for the Committee, allows a group of board members constituting less than a quorum of a board to investigate a matter relating to the board's official business outside of a meeting. Haw. Rev. Stat. § 92-2.5(b)(1) (Supp. 2005). The statute, however, imposes specific procedural requirements that a board must follow in forming the investigative task force and considering the task force's findings and recommendations. Id. More specifically, the board members chosen to participate in the investigative task force must be named at a board meeting and the scope of the investigation and each member's authority must be defined at that time. Id. The investigative task force must report back at a second meeting, and the board cannot discuss or act on that report until

[2] Meetings of a regular or standing committee of a Sunshine Law board are subject to the same open meeting requirements as apply to meetings of the parent board. E.g. OIP Op. Ltr. No. 03-07 at 6.

> another meeting "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." Id. **The language of the statute, in other words, anticipates that an investigative task force will undertake an investigation of defined and limited scope and will make a single report back to its board, after which the board (at a later meeting) may discuss and act on the issue.** Because the permitted interaction allows board members to privately discuss board business, an exception to the usual open meeting requirements, OIP must strictly construe the statutory requirements. Haw. Rev. Stat. § 92-1(3) (1993).

OIP Op. Ltr. No. 07-06 at 3-4 (emphasis added). In that opinion, OIP further stated:

> As noted above, a board must appoint specific members to the investigative task force when the task force is created. Haw. Rev. Stat. § 92- 2.5(b)(1). In OIP's opinion, it would be inconsistent with that explicit requirement for a board to interchange or replace members of the investigative task force once the task force has commenced the "investigation" that it has been charged to perform.

Id. at 5.

The Commission's agendas from May through July routinely included "Discussion and action, if appropriate, on status of work for Technical Committee" and similar topics, which likely contributed to the concerns expressed by Requester and various testifiers as to whether the Technical Committee was complying with the requirements of section 92-2.5(b), HRS. As noted in the OIP opinions above, the statutory language anticipates that a permitted interaction group will make a single report back to its board (which the full board may discuss and act on only at a subsequent meeting) and after its reporting, the permitted interaction group will no longer exist. OIP believes the Commission's practice of routinely including on its agendas the topic of a permitted interaction group's ongoing work was confusing to the public, in that it implied that the Commission might be hearing regular reports from a permitted interaction group in the same way that it would from a regular committee, which would be inconsistent with the requirements of section 92-2.5(b)).

OIP further notes that at the Commission's June 9 meeting, the Commission expanded the scope of the investigation by adding another item to be investigated by the Technical Committee. Section 92-2.5(b) provides that a permitted interaction group's investigation is to be defined "at a meeting of the board," or in other words, during one meeting rather than over a series of meetings. HRS § 92-2.5(b)(1) (emphasis added). The Commission's addition of an additional item to the investigation at a later meeting was not consistent with that statutory scheme.

Nonetheless, because the Technical Committee did not actually begin its work until July 13, well after the addition of the additional item on June 9, OIP cannot find that

the inconsistency rose to the level of a Sunshine Law violation in that the Technical Committee was not a permitted interaction group whose work was ongoing at that point. Because OIP's examination of the Commission's minutes indicates that there was not, in fact, any substantive discussion of the Technical Committee's issues under those headings, OIP cannot conclude that the Commission's discussions constituted multiple reports by the Technical Committee in a manner inconsistent with section 92-2.5(b) and in violation of the Sunshine Law.

In a similar vein, OIP believes that the Commission's vote on May 4 to allow the substitution of other Commission members for the named Technical Committee members was confusing to the public, in that it implied that the Commission would swap out the Technical Committee's membership in a way that would be inconsistent with the requirements of section 92-2.5(b). See OIP Op. Ltr. No. 06-02 at 4-5. Nonetheless, because in practice no substitute ever participated in the Technical Committee's gatherings, OIP cannot conclude that the Commission interchanged or replaced members of the Technical Committee. OIP therefore finds that the Technical Committee operated within the bounds of section 92-2.5 and did not violate the Sunshine Law under the specific facts of this case.

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. Haw. Rev. Stat. § 92-12 (1993). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. Haw. Rev. Stat. § 92-11. A suit to void any final action must be commenced within ninety days of the action. Id.

OFFICE OF INFORMATION PRACTICES

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Cheryl Kakazu Park
Director

STATE OF HAWAII
2011 REAPPORTIONMENT COMMISSION

Tuesday, September 13, 2011

Council members present: Mr. Mike Palcic
Mr. Nathaniel Kinney
Mr. Glenn Ida

Public present: Ms. Shannon Wood
Mr. Tom Smyth
Mr. Chris Wong Reapportionment Staff

I. Call to Order and Determination of a Quorum
The meeting of the Oahu Advisory Council was called to order at 9:15 AM by Chairman Palcic. A quorum was present. Ms. Linda Smith was excused.

II. The minutes of the Sept. 2, 2011 meeting of the Council were approved.

III. Public Testimony

Ms. Shannon Wood is suggesting that the Commission ask for information from U.S. Attorney General on case law or decisions that have been applied to the other states that count the military to help resolve our issues with the non-resident military, etc. She plans to attend the Waipahu Community meeting to address points raised by Mr. Bart Dame at the last Community meeting. She will submit an amendment to her plan that was submitted to the Commission.

Mr. Tom Smyth submitted a letter from the Downtown Neighborhood Board recommending that Kukui Gardens and the high rise buildings on the corner of Bishop and Beretania be included in House District 20. He commented that prior to 1990 the count for redistricting was based on registered voters, but that was changed by a court decision to residents.
Mr. Smyth added that when the Commissioners were polled during the vote on whether to include the military that the vote would be closer than it was. He said that if the military was to be excluded that he would personally contact that military leadership and ask that they withdraw their support from volunteering for future community events since not counting the military sends a message that they are not welcomed into our Communities. 70% of the barracks population of Enlisted and Officers are on base. 50% of the families live in military housing. Most of the Navy Housing is off base. The police and fire are not allowed on bases. The military personnel can change their home of record by registering to vote, paying taxes here, or registering the car, etc.

The State Attorney General has offered an opinion on residency.
A discussion followed expressing concerns on whether or not the judge can set the boundary lines if the state loses the suit. The judge will only set the population number to be used in redistricting. Will military neighbors off base be excluded?

IV: Community Meetings
Mr. Glenn Ida expressed that the Mililani meeting was well attended. There included Reps. Lee and Yamane, Councilman Nester Garcia, and Sen. Michele Kidani and staff persons from other legislators offices. Rep. Lee Testified and Sen. Kidani submitted written testimony. Most of their concerns were focused on keeping the communities as whole as much as possible.

Mr. Mike Palcic added that at the Kapolei meeting a person wanted Kapolei Knolls to be included with another section of Kapolei but because of the numbers in two census blocks, it is difficult to stay within the deviation. At the Kailua meeting a resident commented that the plan OAAC Chair Palcic had provided brought down the deviation substantially, in her opinion.

The OAAC received a letter from Gov. Abercrombie in strong support of drawing the lines on the basis of residency. Accepted as comments for the record.

A discussion followed on the political implications of having a senatorial seat go to the Big Island of Hawaii.

V. Technical Subcommittee of the OAAC
No report.

VI. Schedule of next meeting and adjournment.
Next meeting will be held on Wednesday, Sept. 21, 2011, at 9 AM, State Capitol, tentatively in room 312.

Adjourned 9:45 AM

Respectfully submitted,

Glenn Ida, Vice-Chair OAAC
For Linda Smith, Secretary OAAC

STATE OF HAWAII

2011 REAPPORTIONMENT COMMISSION

MINUTES

APPORTIONMENT ADVISORY COUNCIL FOR MAUI
Wednesday, August 31, 2011
4:45 PM
Maui Waena School
Parking lot in front of school
795 Onehee Avenue
Kahului, Hawaii

Chair Madge Schaefer called meeting to order at 4:45 PM. All members of the Council were present.

No one from the public attended.

The Council discussed a Resolution to be presented to the Reapportionment Commission regarding non-resident military and dependents. Motion to approve the Resolution was made by Fred Rohlfing, seconded by Christopher Chang. Motion passed with no opposition.

There being no further business, a motion to adjourn was made by Mark Andrews, seconded by Christopher Chang. Motion passed with no objection.

Meeting adjourned at 5:05 PM.

State of Hawaii 2011 Reapportionment Advisory Council for Maui

Resolution Opposing the 2011 Reapportionment Commission's Decision to Use the Total Population Rather than Number of Permanent Residents as the Population Base for Reapportionment

August 31, 2011

WHEREAS, the 2011 Reapportionment Commission is bound by the Constitutions of the United States and the State of Hawaii; and

WHEREAS, the United States Supreme Court explained in Reynolds v. Sims, 377 U.S. 533, 577 (1964), that so long as state electoral representation is apportioned on a population base, there is no violation of the Equal Protection Clause of the United States Constitution; and

WHEREAS, the United States Supreme Court explicitly stated in Burns v. Richardson, 384 U.S. 73, 92 (1966), that for the purposes of drawing district lines, it is constitutionally permissible for a state to exclude from its population base "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of a crime;" and

WHEREAS, the United States Supreme Court also stated in Burns v. Richardson, 384 U.S. 73, 92 (1966), that in state redistricting, "[t]he decision to include or exclude any such group involves choices about the nature of representation with which [they] have been shown no constitutionally founded reason to interfere[;]" and

WHEREAS, the rules for redistricting and reapportionment for the United States Congress and for other states do not apply to legislative apportionment for the State of Hawaii and should not supplant the laws that have been adopted by the people of this state; and

WHEREAS, Article IV Section 4 of the Hawaii State Constitution, entitled "APPORTIONMENT AMONG BASIC ISLAND UNITS" explicitly requires the 2011 Reapportionment Commission to use the "total number of permanent residents in each of the basic island units" when allocating legislators "among" the four basic island units, thereby making equal apportionment between island units a preeminent constitutional duty; and

WHEREAS, Article IV Section 6 of the Hawaii State Constitution, entitled "APPORTIONMENT WITHIN BASIC ISLAND UNITS" requires that "the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled" must be made first, pursuant to section 4, before redrawing district lines, thereby making the process of redistricting incidental to the apportionment of legislators among the basic island units; and

WHEREAS, the 1991 Reapportionment Commission clearly enunciated this two-step process on pages 15 and 17 of its Final Report; and

WHEREAS, the 2001 Reapportionment Commission also clearly enunciated this two-step process on page 14 of its Final Report by explaining, "With respect to State legislative districts, Article IV of the State Constitution provides for reapportionment to be performed using the following steps. First, the Commission is to allocate the total number of members of each house of the State legislature among the four basic island units (Hawaii, Maui, Kauai and Oahu), and computed using the method of equal proportions. Second, the Commission is to draw the district lines within each basic island unit so that for each house the average number of permanent residents per member is as nearly equal to the average for the basic island unit as practicable," and

WHEREAS, Hawaii Revised Statutes (HRS) 25-2(a) requires the 2011 Reapportionment Commission to follow "the basis, method, and criteria prescribed by . . . article IV of the Hawaii Constitution; and

WHEREAS, the military personnel and their dependents who are currently located in Hawaii but consider another state to be their permanent residence are transients and are temporarily located in Hawaii for a short-term; and

WHEREAS, the plain meaning of the term "permanent residents" logically excludes transients, short-term or temporary residents; and

WHEREAS, there is no federal precedent holding that a permanent resident base could not be used for state legislative reapportionment; and

WHEREAS, the U.S. Constitution does not require a state to consider active military personnel and their dependents as "permanent residents" in redistricting state legislative district lines; and

WHEREAS, any purported concern that excluding non-permanent residents will somehow abridge the equal protection rights of certain protected classes is tenuous, and is not based on any federal precedent nor on a real legal challenge or threat thereof by any specifically identifiable plaintiff(s); and

WHEREAS, non-permanent residents were successfully excluded from the population in the last three reapportionments without legal challenge; and

WHEREAS, the 2011 Reapportionment Commission decided on June 28, 2011 to reverse the approach taken by the last three reapportionment commissions which used permanent residents as the population base, and instead, voted to "use the U.S. Census population count as the resident population base for state redistricting;" and

WHEREAS, the motion on the June 28, 2011 vote (page 11 and 22 of the June 28, 2011 minutes) reflects a per se violation of the Hawaii Constitution because the commission ignored the requirement that the population base be of "permanent residents," and instead favored a base composed of "the resident population;" and

WHEREAS, the U.S. Census population count is understood to include non-permanent residents present in the state at the time the census data is collected; and

WHEREAS, the 2011 Reapportionment Commission's June 28, 2011 decision to count individuals known to be transients, short-term, or temporary residents as "permanent residents" runs afoul of the plain language in the Hawaii State Constitution; and

WHEREAS, several members of the public have commented that the 2011 Reapportionment Commission is window dressing its June 28, 2011 decision to include non-resident military as a gesture to support our troops, when instead it is a tactic to further centralize the political and representative power on the Island of Oahu; and

WHEREAS, one concerned voter persuasively referred to the decision as a "cheesy move;" and

WHEREAS, the term "permanent resident" used in Article IV Sections 4 and 6 of the Hawaii Constitution replaced the term "registered voters" by way of constitutional amendment by the 1992 legislature and electorate; and

WHEREAS, the legislative history behind the term "permanent resident" in the Hawaii Constitution is relevant and instructive; and

WHEREAS, the 1968 Constitutional Convention settled on 'registered voters' as an accurate estimation of eligible voters, which they decided would be the most appropriate apportionment base for the state "because it excluded nonresidents, transients, aliens, incompetents, felons and minors[,]" as discussed in the Legislative Reference Bureau's "Hawaii Constitutional Convention Studies 1978, Article III: Reapportionment in Hawaii Volume II;" and

WHEREAS, a federal court in Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) determined that the 1981 Reapportionment Commission's use of a population base of "registered voters," as previously required by the Hawaii Constitution, was impermissible under the United States Constitution, therefore compelling the need for the 1992 amendment to the Hawaii Constitution; and

WHEREAS, the 1991 Reapportionment Commission took the decision in Travis v. King into account when it decided to use a population base of "permanent residents," which specifically excluded non-resident students and non-resident military and their dependents; and

WHEREAS, the 1991 Reapportionment Commission commented on its deliberations over using U.S. census data when it stated in on page 45 in Chapter VII of its Final Report: "Because of the presence of a large number of transients in Hawaii who are included in the federal census population and whose presence distorts the number of Hawaii's citizens, prior Constitutional Conventions did not adopt the census population as an appropriate apportionment base. The Commission agrees that the census (total) population is unsuitable for apportionment of legislative districts[;]" and

WHEREAS, H.B. 2327 H.D. 1 S.D.1 Session Laws of Hawaii 1992 was passed by the 1992 Hawaii State Legislature, which did little more than to deliberately adopt the approach taken by the 1991 Reapportionment Committee by amending the Hawaii State Constitution to require that the state reapportionment process use a population base of "permanent residents" rather than "registered voters;" and

WHEREAS, all drafts of H.B. 2327 passing through all committees during the 1992 legislative session used the term "permanent residents," indicating that the term was not controversial; and

WHEREAS, the House Committee on the Judiciary of the 1992 Hawaii State Legislature explained that amending the constitution to use "permanent residents" rather than "resident voters" required "the total number of permanent residents counted in the last preceding United States census" be used in "determining reapportionment districts," (H. Stand. Comm. Rept. No. 522-92 Haw. H.J. 1094 (1992); and

WHEREAS, the Chairperson of the 1991 Reapportionment Commission testified in support of H.B. 2327 before the Senate Committee on the Judiciary in the 1992 Hawaii State Legislature, and attached the Final Report of the 1991 Reapportionment Commission to her testimony, addressing it as a discussion to be included in the legislative record; and

WHEREAS, the Senate Committee on the Judiciary of the 1992 Hawaii State Legislature, in its committee report, expressly relied upon the reasoning stated in Chapter III of the 1991 Reapportionment Commission's Final Report when it recommended passage of H.B. 2327 H.D. 1 S.D.1 (S. Stand. Comm. Rept. No 2287-92, Haw. S.J. 1048 (1992); and

WHEREAS, in Chapter III of their Final Report, the 1991 Reapportionment Commission documented their thorough deliberations over the various types of population bases they considered for the 1991 reapportionment, which included "total population, based upon census figures; total population less transients (i.e., permanent residents)[;] and total population less transients and minors (i.e., permanent residents less minors);" before settling on a base of "permanent residents;" and

WHEREAS, Chapter III of the Final Report of the 1991 Reapportionment Commission also provides an extensive list of persuasive reasons for excluding the military and their dependents; and

WHEREAS, the 1991 Reapportionment Commission also observed, on pages 24 and 45 of their Final Report, that historically, the framers of the Hawaii Constitution, before the 1992 amendments, had intended that districts be drawn using a resident or citizen population base which excluded transients; and

WHEREAS, the 1991 Reapportionment Commission recognized, on page 25 of Chapter III of their Final Report, that voters in districts with a large presence of transient populations, such as those encompassing military bases, will distort the size of certain districts and have their votes "'overweighed' beyond fairness and beyond the 'one person, one vote' principle[;]" and

WHEREAS, the 1991 Reapportionment Commission stated, on page 25-26 of Chapter III of their Final Report, that military personnel and their dependents have the choice of becoming Hawaii residents and registering to vote in this state; and

WHEREAS, the 1991 Reapportionment Commission determined, on page 26 of Chapter III of their Final Report, that most military personnel consider Hawaii a temporary residence; and

WHEREAS, the 1991 Reapportionment Commission determined that in 1990, only 3% of the military opted to become Hawaii citizens, showing that the overwhelming majority do not have the intent of making Hawaii their permanent home, as reflected on page 26 of Chapter III of their Final Report; and

WHEREAS, on page 26 of Chapter III of their Final Report, the 1991 Reapportionment Commission determined that a significant number of the military personnel in Hawaii on the date the census was taken for the 1991 reapportionment were temporarily in port on ships or stationed in quarters; and

WHEREAS, the 1991 Reapportionment Commission determined that 14% of the State's population were nonresident military, as reflected on page 25 of Chapter III of their Final Report; and

WHEREAS, the 1991 Reapportionment Commission settled on a final population base of "permanent residents" rather than "total population" because they did not wish to include non-resident military and college students; and

WHEREAS, the only dissension to the population base initially proposed by the 1991 Reapportionment Committee was on the decision to exclude minors, discussed on page 23-24 of Chapter III of their Final Report, with there being no objection to excluding non-resident military and their non-resident dependents; and

WHEREAS, the public fully supported the use of a permanent resident base which included minors in the 1991 reapportionment, as stated on page 24 of Chapter III of their Final Report; and

WHEREAS, the determinations made by the 1991 Reapportionment Commission continue to be persuasive because there is no hard evidence nor reliable data to discredit the application of the policy that is guided by these determinations today; and

WHEREAS, The Honorable Richard Clifton, currently a federal judge on the 9th Circuit Court of Appeals, who, as a member of the 1991 Reapportionment Commission, provided separate written testimony in support of H.B. 2327 which explained that "[t]he Commission concluded . . . that 'total population' is unsuitable for apportionment of legislative districts, principally due to the large number of military personnel and dependents who live in areas concentrated around military bases;" and

WHEREAS, Richard Clifton also highlighted the fact that the reapportionment commissions for the reapportionments done in 1983-84 and 1991 also adopted "adjusted population" bases that excluded non-resident military personnel and dependents; and

WHEREAS, Richard Clifton explained in his testimony that the vast majority of the military and their dependents maintain a non-resident status in Hawaii; and

WHEREAS, Richard Clifton specifically sought, through his testimony, to have the 1991 Reapportionment Commission's intended meaning of "permanent resident" to be expressed in the legislative record as a population base that subtracted the number of non-resident military personnel and their dependents; and

WHEREAS, there is nothing in the legislative history of H.B. 2327 Session Laws of Hawaii (1992) that would dispute the legislative intent reflected in Richard Clifton's testimony; and

WHEREAS, on November 3, 1992, the majority of the people of Hawaii approved the constitutional amendment adopted by the 1992 legislature, pursuant to Article XVII Section 3, by answering "yes" to the question: "Shall the reapportionment commission use the total number of permanent residents instead of the registered voters as the reapportionment base?"; and

WHEREAS, to assist voters in answering that question, the 1992 electorate was provided with instructions which elucidated the meaning of "permanent resident" by stating: "During 1991, the Commission held public hearings and it was recommended that the legislature apportionment base be changed from registered voters to permanent residents. Initially, the Commission had intended that the population base would consist of permanent residents, derived from subtracting minors and nonresident military and their dependents from the total population figures provided in the 1990 Census. However, overwhelming testimony persuaded the Commission to include minors in the count. The commission chose to use the number of permanent residents as the legislature apportionment base because the number of permanent residents was the base used in the last legislative reapportionment, the Proceedings of the Constitutional Convention of Hawaii in 1968 supported its use, the number of canoe districts was reduced, and there was no opposing legal precedent. Minors were included in the count of permanent residents because exclusion of children is contrary to Hawaiian tradition and several organizations testified that if minors were excluded, rural areas and certain ethnic groups such as native Hawaiians would be underrepresented;" and

WHEREAS, in Citizens for Equitable and Responsible Government v. County of Hawaii, et al., 108 Haw. 318 (2005), the Hawaii Supreme Court ruled on the legal propriety of including transient populations, specifically non-resident military and their dependents, in the population base used for County redistricting on the Island of Hawaii; and

WHEREAS, in Citizens, 108 Haw. at 322, the Hawaii Supreme Court considered the 1992 amendments to the Hawaii Constitution in its examination of similar provisions of the County of Hawaii's Charter on redistricting; and

WHEREAS, the most significant difference in the redistricting criteria between the Charter of Hawaii County and Article IV section 4 of the Hawaii Constitution is that Hawaii County uses the term "resident populations" as its population base, rather than "permanent residents;" and

WHEREAS, the term "resident populations" as used in the Hawaii County Charter is plainly, logically, and necessarily broader than the modified term "permanent residents," which is used in the Hawaii Constitution; and

WHEREAS, in Citizens, 108 Haw. at 324, the Hawaii Supreme Court determined that the term "resident populations" did NOT include non-resident college students and non-resident military personnel and their dependents; and

WHEREAS, in Citizens, 108 Haw. at 323, the Hawaii Supreme Court relied upon Black's Law Dictionary's definition of "resident" as needing "genuine intent" and some "indicia that his [or her] presence within the State is something other than merely transitory in nature;" and

WHEREAS, in Citizens, 108 Haw. at 323, the Hawaii Supreme Court stated that "the transitory nature of military personnel from outside Hawaii County is apparent" and that the military "seemingly lack a present intent to remain in the county[;]" and

WHEREAS, in Citizens, 108 Haw. at 323, the Hawaii Supreme Court reasoned that the drafters of the Hawaii County Charter would have used the term "total population" if they intended the population base to include nonresident college students and nonresident military personnel and their dependents; and

WHEREAS, the 1991 Reapportionment Commission also contemplated use of the term "total population" but decided against it when it settled on the term "permanent residents," as reflected on page 23 of their Final Report; and

WHEREAS, the Hawaii Supreme Court reasoned in Citizens, 108 Haw. at 322-323, that Article IV of the State Constitution "mandated that only residents having their domiciliary in the State of Hawaii may be counted in the population base for the purpose of reapportioning the legislative districts," and that "domicile" "means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights;" and

WHEREAS, the 2011 Reapportionment Commission reported on June 6, 2011 that it has sought a written opinion from the Department of the Attorney General which is germane to its June 28, 2011 decision not to adjust the U.S. Census data to reflect a count of permanent residents, but has chosen not to make that opinion available to the public; and

WHEREAS, the 2011 Reapportionment Commission's unwillingness to release any opinions given to it by the State Attorney General's office on questions relating to the permanent resident population base raises serious doubts as to whether the commission's decision is supported by that opinion; and

WHEREAS, in response to questions presented to it by Representative Robert N. Herkes, the State of Hawaii Department of the Attorney General issued an opinion dated July 19, 2011, stating that "[b]ased upon the Hawaii Supreme Court's decision in Citizens and the legislative history to the 1992 amendment to article IV of the State Constitution, it appears that the Hawaii Supreme Court would likely hold that to the extent they are identifiable, nonresident college students and non-resident military members and their families cannot properly be included in the reapportionment population base the Commission uses to draw the legislative district lines this year[;]" and

WHEREAS, the July 19, 2011 State Attorney General opinion also states "it does not appear that the Hawaii Supreme Court would conclude that including all military personnel stationed in Hawaii and their families, irrespective of whether they are residents of Hawaii, in the 'permanent resident' population

base that is used to reapportion the State's legislative districts in 2011, satisfies article IV, section 4;" and

WHEREAS, the Hawaii County Committee of the Democratic Party of Hawaii adopted a resolution on June10, 2011 requesting the commission to reverse its decision and to urge a legal challenge by the Democratic Party should it refuse to do so; and

WHEREAS, there is a high likelihood that if the 2011 Reapportionment Commission does not rescind its June 28, 2011 decision to include non-resident students and non-resident military and their dependents, this decision will be challenged as violation of the Hawaii Constitution; and

WHEREAS, under Article IV, section 10 of the Hawaii State Constitution, the Hawaii Supreme Court has original jurisdiction for such a challenge; and

WHEREAS, the Citizens case has precedential effect on future decisions of the Hawaii State Supreme Court; and

WHEREAS, the record is fraught with objections and questions on the unlawful use of the total census population data as a substitute for a permanent resident population base; and

WHEREAS, there are serious concerns as to whether the 2011 Reapportionment Commission's vote to use the U.S. Census data was made in violation of the Sunshine Law under Hawaii Revised Statutes section 92-7(d), which does not allow a board to add or amend an agenda item that "is of reasonably major importance and action thereon by the board will affect a significant number of persons" when the commission added to the June 28, 2011 agenda a vote on population base, went into an executive session lasting an hour and a half, reconvened, moved, and then decided the matter; and

WHEREAS, much of the deliberations over this decision were not open to the public but conducted in executive session and not expressed until the matter was voted on June 28, 2011, thereby limiting the public's ability to provide meaningful input and testimony; and

WHEREAS, the redistricting plan must comply with both the federal and state constitutions; and

WHEREAS, the United States Supreme Court, in Reynolds v. Sims, 377 U.S. 533, 577 (1964) has stated that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires "that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable;" and

WHEREAS, a number of federal and state court decisions (e.g. White v. Regester, 412 U.S. 755 (1973); Mahan v. Howell, 410 U.S. 315(1973); Citizens for Equitable and Responsible Government v. County of Hawaii, et al., 108 Haw. 318 (2005)), have established that an overall deviation of over 10% of the population count between districts is prima facie evidence of discrimination and must be justified by a rational state policy; and

WHEREAS, if it is presumed that a population base permissible under the Hawaii Constitution is to be honored, and if the lines drawn in the current redistricting plan remain unchanged, it is highly likely that the population of permanent residents in the district with the highest concentration of non-resident military and their dependents, when compared with the population of permanent residents of other districts across the state, will violate the 10% deviation standard requiring justification; and

WHEREAS, the 2011 Reapportionment Commission's June 28, 2011 decision to use a resident population based on the U.S. Census data, which includes individuals known to be non-permanent residents, rather than an adjusted population base of "permanent residents," is not rational because it violates Article IV, Section 4 of the Hawaii Constitution and was made without making a honest and good faith effort to adhere to the Hawaii Constitution; and

WHEREAS, it appears the 2011 Reapportionment Commission's decision to include non-resident military and their dependents, however laudable to many, is not rational because the decision was principally based upon effectuating policies that are outside the scope of the commission's authority; and

WHEREAS, it is highly likely, evidenced by their expressed intent and history of transience, that the non-resident military, their dependents, and non-resident students will only reside in Hawaii for short periods that will not extend beyond the ten-year term of the districts' existence, and any plan that presumes their residences are permanent for the purposes of representation will fail to advance a policy of inclusiveness for any given non-permanent resident for the entire ten-year period; and

WHEREAS, even if a plan which includes non-resident military, their dependents, and non-resident students within a "permanent resident" population base is found justifiable by a court, these populations live in such concentrated areas, there is a high likelihood that if their numbers were subtracted from the total population of each of the districts so as to comply with the Hawaii Constitution, the result would create intolerable plan divergences; and

WHEREAS, in showing that a districting plan passes muster under the federal constitution, the federal court in Travis v. King, 552 F. Supp. 554, 566 (D. Hawaii 1982), reiterated what the Supreme Court stated in Burns, that "at the very least, the state is obligated to provide some degree of proof that the proposed plan approximates the results of a plan based on an appropriate population base;" and

WHEREAS, for purposes of fairness and parity with federal criteria on a court's constitutional scrutiny of a redistricting plan, the same high level of proof should be required in defending the rationality of the 2011 Reapportionment Commission's decisions that facially violate the Hawaii State Constitution; and

WHEREAS, the 2011 Reapportionment Commission has not engaged in public deliberations discussing, in detail, what standard of accuracy is necessary for rejecting any methodology of extraction; and

WHEREAS, there has been no clear statement or indication that it is impossible to determine the number and location of nonresident military and their dependents in the state; and

WHEREAS, the Commission has not provided any correspondence or record of communications showing that it had been actively and aggressively seeking the data it needs from the military to extract the non-

resident military and their dependents, which supports a presumption that it does not wish to do an extraction; and

WHEREAS, in Reynolds v. Sims, 377 U.S. at 577, the United States Supreme Court stated that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement;" and

WHEREAS, the United States Supreme Court also established, in Reynolds v. Sims, 377 U.S. at 577, that precision is not required for reapportionment, but an "honest and good faith effort" is; and

WHEREAS, lack of exactness or precision should not be viewed as a barrier to drawing district lines that are otherwise within constitutional limitations; and

WHEREAS, the reasons that may be given to discredit the extraction process for non-resident college students should not be projected onto the non-resident military where the facts, volumes, and quality of data greatly differ; and

WHEREAS, concerns over the inaccuracy of drawing lines between adjacent districts in areas with a high military presence are confined to the island of Oahu and should not overshadow the inequities in constitutional representativeness that would result if all efforts to extract non-resident military are abandoned; and

WHEREAS, data which is imprecise does not mean it is statistically insignificant, particularly with an understanding that (1) the vast majority of non-resident military and their dependents live on Oahu; and (2) the negligible effect that inexactitude would have on the allocation of legislators among the basic island units, as required by Article IV section 4 of the Hawaii Constitution; and

WHEREAS, available modeling methodologies and efforts to extrapolate from data obtained in past reapportionments should adequately offset any current deficiencies in the residency data of transient populations, to the extent that employing them more closely achieves a constitutionally mandated apportionment than would abandoning all such methodologies and efforts; and

WHEREAS, any effort to give meaning to the word "permanent" in the Hawaii Constitution is better than none; and

WHEREAS, in Egan v. Hammond, 502 P.2d 856, 870 (Alaska 1972) the Alaska Supreme Court grappled with similar questions on a reapportionment based on a "civilian population," and noted that "the substantial military population present in the state because of military orders and without intention to make Alaska their home can easily give an unbalanced representation to areas abutting their bases[;]" and

WHEREAS, the court in Egan, 502 P.2d at 888, recognized that determining the residency of military personnel for Alaska's reapportionment was a "highly subjective and arbitrary process," but concerns of this nature in the reapportionment of Hawaii should be limited to the Article IV section 6 process of

redistricting Oahu, where virtually all active duty military and their dependents reside, and should not impact the more paramount objective of achieving constitutional representativeness through a constitutionally mandated apportionment of legislators among the basic island units pursuant to Article IV Section 6; and

WHEREAS, in a similar challenge to a subsequent reapportionment in Alaska, the Alaska Supreme Court held in Hickel v. Southeast Conference, 846 P.2d 38, 55 (Alaska 1992), that although "exclusion is not constitutionally required[,] if it is not possible to accurately identify those military personnel who are non-residents," "estimations" are permissible; and

NOTWITHSTANDING, the persuasive application Alaska case law may or may not have on a court's interpretation of the Hawaii Constitution on reapportionment, Hawaii's distinguishable geographic features and the great divergence between the strong identity of political, historical, residential, agricultural, and commercial interests of each of its island units should be honored by fair representation in our state legislature; and

WHEREAS, The 2011 Reapportionment Commission Chairperson stated on the record at the June 9, 2011 meeting that she "would also like the Technical Committee's work and process be transparent for the public;" and

WHEREAS, up until August 17, 2011, the Reapportionment Commission has failed to disclose to the public any attempts to calculate, model, and/or map out any districts based on the available extraction data; and

WHEREAS, not until August 17, 2011, more than seven weeks after their decision to use the U.S. Census data as the population base, has the 2011 Reapportionment Commission made any effort to apprise the public, with any degree of specificity, on how the methodology of extracting the non-permanent residents is problematic; and

WHEREAS, the August 17, 2011 presentation by the 2011 Reapportionment Commission Staff focused on data received from the military about the zip codes where Oahu's military report to duty, not where they reside; and

WHEREAS, the 2011 Reapportionment Commission's discussion of the August 17, 2011 presentation has obfuscated the extraction process by focusing on incompatible numbers – one where the military work against one where people live; and

WHEREAS, the 2011 Reapportionment Commission's discussion of the August 17, 2011 presentation left the impression that the extraction process is absurd by highlighting the most extreme example from zip code 96857, Schofield Barracks, where re-districting poses the greatest challenge because the military reported that 17,004 military personnel report to duty in that zip code, and the U.S. census indicates that 2,522 people reside there; and

WHEREAS, the 2011 Reapportionment Commission's discussion of the August 17, 2011 presentation made it unclear that the numbers provided by the military were for the military personnel *reporting to*

duty at these zip codes, as is evidenced by (1) the mis-reporting in the August 17, 2011 Civil Beat article that stated these were numbers reflecting where military personnel lived, and (2) by the multiple calls the Reapportionment Commission received seeking clarification on the matter; and

WHEREAS, the 2011 Reapportionment Commission's discussion of the August 17, 2011 presentation left the impression that the extraction methodology discussed was the only one available; and

WHEREAS, the public's likely misinterpretation of the August 17, 2011 presentation is that the commission must make a choice between employing an extraction method on data which produces absurd results, or abandoning all efforts in favor of a simpler, more facially acceptable approach using U.S. Census data; and

WHEREAS, the 2011 Reapportionment Commission's discussion of the August 17, 2011 presentation and the confusion it engendered seemingly supports the commission's claim that extraction is too speculative and unreliable to justify using; and

WHEREAS, the August 17, 2011 presentation may be a staged attempt to demonstrate efforts of taking a "hard look" at the data, consistent with what was done by Alaska's reapportionment board in Hickel, 846 P.2d at 55; and

WHEREAS, a "hard look" at the wrong data, should not suffice when data on the non-resident military's residential zip codes, rather than their duty codes, may be available or determined through modeling and/or extrapolation; and

WHEREAS, the purported rationale for the commission's June 28, 2011 decision to use the 2010 U.S. Census data as a resident population base, rather than the constitutionally required base of "permanent residents" has evolved in response to the objections as they are raised; and

WHEREAS, as evidenced by the rationale expressed by the commissioners, the 2011 Reapportionment Commission's June 28, 2011 decision was on a motion to "use the U.S. Census population count as the resident population base for State redistricting" as a matter of promoting a policy of inclusiveness that is not provided by the Hawaii Constitution, not because there were identifiable problems with the data on non-permanent residents; and

WHEREAS, and according to reports from the 2011 Reapportionment Commission staff, up until August 5, 2011, there has not been adequate data from the military to do an extraction; and

WHEREAS, up until August 17, 2011, little information has been disclosed to the public as to the nature of the data received from the military; and

WHEREAS, without this data, it was premature for the commission to make decisions premised on specific problems associated with working with the data; and

WHEREAS, the unavailability of data from the military was only scarcely mentioned during the June 28, 2011 decision, however, when public testimony and the Office of the Attorney General opined that their

decision violated the Hawaii Constitution, the commission then focused on the unavailability of this data and the deadlines imposed for constructing plans as the reason for including the military in the proposed plan; and

WHEREAS, the commission's shifting post hoc rationale implies that the desired outcome may have already been decided based on the commissioners' political and regional bias; and

WHEREAS, the commission has stopped defending the constitutionality of their decision and has instead focused on presenting reasons why the non-permanent residents are unidentifiable due to the perceived imprecision of the data and the speculation associated with the extraction process, as is baited by the attorney general office's opinion and the Alaska case law; and

WHEREAS, on June 9, 2011, the commission actively sought feedback from the Advisory Councils on the question of excluding the non-permanent residents like the military, and the Counties of Maui, Hawaii, and Kauai voted against including non-resident military and their dependents; and

WHEREAS, the Oahu County Advisory Council was the sole Advisory Council that voted to include non-resident military and their dependents; and

WHEREAS, at the time of the vote on the decision to use the U.S. Census data to draw districts, the 2011 Reapportionment Commission was composed of eight Oahu-based commissioners and one neighbor-island based Commissioner; and

WHEREAS, the sole neighbor-island commissioner is the only commissioner who voted against the decision to include non-resident military and their dependents; and

WHEREAS, the votes of each of the commissioners and advisory councils are clearly divided between the neighbor islands and Oahu; and

WHEREAS, the lack or lateness of publicly available data, correspondence, and open discussion over the difficulties the commission is facing in obtaining the data reflects a remarkable lack of urgency, passive indifference, and/or willful inaction on behalf of the commission; and

WHEREAS, had the commission a genuine intention and desire to honor the Hawaii Constitution, we would have seen more aggressive action in obtaining the information much earlier in the process, as well as full transparency on specifics as to why they believed the extraction methodologies fail; and

WHEREAS, the commission's apparent indifference and failure to more aggressively press for this information may imply a more subversive political objective to increase the concentration of representative power on the island of Oahu, where the majority of the non-resident military of Hawaii and their dependents are located; and

WHEREAS, the largest rate of growth has occurred in the County of Hawaii to the extent that they would receive another state senate seat if, as determined by the 2011 Reapportionment Commission staff, at least 20,094 non-resident military and/or their dependents are excluded from the population base; and

WHEREAS, failure to obtain fully precise data on the location of non-resident military and their dependents is only significant enough to adversely impact the accuracy of district lines abutting or near military bases on the Island of Oahu, not on the neighbor islands; and

WHEREAS, as a matter of policy as reflected in the text and structure of the Reapportionment provisions in the Hawaii Constitution, imprecise data on the location of non-resident military and their dependents on Oahu should not adversely impact the representation of neighbor island populations for purposes of reapportionment among the basic island units; and

WHEREAS, the adverse impacts to the representation of certain military-heavy districts on Oahu can be mitigated by modeling and extrapolation from prior redistricting data completed by past commissions; and

WHEREAS, the adverse impacts of extraction will likely offset each other as census blocks and districts are aggregated in military-heavy regions; and

WHEREAS, in a choice between adopting the proposed plan, which includes non-resident populations; or, employing a method that may not perfectly inform the districting process so that it creates precise districts lines in certain military-heavy areas of Oahu - yet is an honest and good faith attempt to abide by the constitutional mandate to use a population base of permanent residents; there would be greater harm done to the representation of permanent residents of the County of Hawaii if the proposed plan remains unchanged, than any harm that may be done to the residents of Oahu districts near military bases resulting from somewhat skewed borders where non-permanent residents were imperfectly extracted; and

WHEREAS, if there is no extraction, the greater harm to the permanent residents of the County of Hawaii and the dilution of their political power is even more pronounced when compared to the stronger representative power of the voters within the military-heavy districts of Oahu and if done with explicit disregard of the Hawaii Constitution that limits the population base to permanent residents; and

WHEREAS, by reversing its June 28, 2011 decision, the commission can reduce the amount of harm that might be done to the permanent residents of Hawaii, and also preserve the integrity of the commission and the Hawaii Constitution; and

WHEREAS, members of the 2011 Reapportionment Commission has publicly expressed concerns over the conjecture, imprecision, and impracticability of extracting non-resident military personnel, their dependents, and non-resident students from the U.S. Census data as a reason for rejecting the constitutionally mandated population base; and

WHEREAS, there are also inherent problems in the compilation of the U.S. Census Data which undermine its accuracy, but this data is regarded as an acceptable estimation of the resident population; and

WHEREAS, according to the data disclosed to the public on August 17, 2011, there are 47,082 Active Duty military personnel who declared a state other than Hawaii their home state; and

WHEREAS, according to this data, there are 933 Active Duty personnel who declare Hawaii their home state; and

WHEREAS, for a total of 48,015 Active Duty Military personnel in Hawaii, 1.94% consider Hawaii home; and

WHEREAS, there are 58,949 Active Duty Military dependents living in Hawaii, and if the percentage of 1.94% were used to extrapolate the number of dependents that are permanent residents of Hawaii, that would leave 1,144 permanent residents and 57,805 non-permanent residents; and

WHEREAS, a reasonable estimation of the non-resident military living in Hawaii would result in 57,805 + 47,082 = 104,887 non-permanent military personnel and dependents that should be extracted from the total population base; and

WHEREAS, according to additional data provided on August 17, 2011, there are approximately 15,463 non-resident students living in Hawaii; and

WHEREAS, a reasonable estimation of the total non-permanent residents living in Hawaii is 120,350; and

WHEREAS, the Reapportionment Commission Staff has indicated that an extraction of at least 20,094 would result in an Oahu Senate seat moving to the Big Island, and an extraction of at least 107,464 would also move an Oahu House seat to the Big Island; and

WHEREAS, even if 17% of the total non-permanent resident population estimated above can be properly extracted, the Big Island would get a senate seat; and

WHEREAS, the exact extraction methodology of past commissions need not be employed to make an honest, good faith effort in reapportioning legislative seats; and

WHEREAS, a comparison of two maps of the military-heavy districts as (1) presently drafted, and (2) after an honest and good faith extraction would be extremely helpful to the public and the commission in understanding the impact of the June 28, 2011 decision; and

WHEREAS, if there is a presumption that the commission is committed to honoring the Hawaii Constitution, and no honest, good faith effort to extract non-permanent residents is made, then reapportionment and redistricting would have resulted from a process which employed much greater conjecture and imprecision than an approach that utilized available extraction data; and

WHEREAS, state legislators have been fully capable and willing to represent the interests of non-resident populations as evidenced by State Representative Cindy Evans' testimony before the 2011 Reapportionment Commission on July 12, 2011, stating that she carefully considers the impact her decisions have on non-resident populations; and

WHEREAS, outside of reapportionment, there has been no indication that the military is dissatisfied with the quality of the representation provided by the legislators from the districts where they reside; and

WHEREAS, in the current proposed plan, the target population represented by each Hawaii Island senator is 61,693, compared to 52,956 for each Oahu senator, which provides each Hawaii Island resident approximately 85% of the political power as an Oahu based-resident; and

WHEREAS, a non-permanent resident on Oahu, when averaged with other Oahu districts, has approximately 116% of the political power of a permanent Big Island resident; and

WHEREAS, assuming that there is a much higher concentration of non-permanent residents in districts encompassing and abutting military bases, the non-permanent residents in those districts will have significantly more political power than 116% of a Big Island permanent resident; and

WHEREAS, the non-resident population of Hawaii are politically invested and often registered to vote in a state other than Hawaii; and

WHEREAS, Senator Malama Solomon, Representative Robert N. Herkes, and Representative Cindy Evans, each legislators from the Big Island, have testified on July 12, 2011 in clear opposition to the commission's June 28, 2011 decision, some citing the 1992 amendments to the Hawaii Constitution and its legislative history; and

WHEREAS, there has been extensive written testimony opposing the commission's decision submitted by major political and public interest groups, such as the Hawaii County Committee Democratic Party of Hawaii, the Maui County Republican Party, the League of Women Voters, the Iron Workers Stabilization Fund; and

WHEREAS, the 2011 Reapportionment Commission Staff indicated on June 9, 2011, relatively early in the reapportionment process, that even if there were to be an extraction of over 20,000 residents, an Oahu Senate seat would transfer over to the Big Island – just a few weeks before the June 28, 2011 decision; and

WHEREAS, using the U.S. Census data without doing any extractions will most certainly include all non-permanent residents in a clear violation of Article 4 section 4 because no effort would be made to give the term "permanent" meaning; and

WHEREAS, certain demographic groups, like Native Hawaiians, which have a larger proportional presence on neighbor islands, will have their political power diluted if the non-resident military are counted; and

WHEREAS, the large number of transients living on Oahu on or near military bases, if counted, will significantly shrink the size of certain districts that should be drawn based on the number of permanent residents residing therein; and

WHEREAS, by registering to vote in Hawaii, the military and their dependents continue to have the ability to establish themselves as permanent residents of Hawaii and to be included in a constitutionally permissible population base of permanent residents, should they wish to do so; and

WHEREAS, at the time the census data was collected for purposes of the 2011 reapportionment, the nation was engaged is multiple military operations across the world, with the State of Hawaii serving as a temporary residence for a significant number of military personnel and their dependents in a way that is proportionally unparalleled in other states; and

WHEREAS, the number of nonresident military personnel and their dependents located in Hawaii will likely fluctuate in the next decade, as the nature of the United States' military engagements changes; and

WHEREAS, the district lines approved by the 2011 Reapportionment Commission will not change within the next ten years, despite likely fluctuations in the military presence in Hawaii; and

WHEREAS, the 2011 Reapportionment Commission has the ability to greatly reduce the likelihood that its districts will not violate the constitutional requirement that districts be composed and represented in the legislature in equal proportions throughout the ten year period by subtracting non-permanent residents as required by Article IV section 4 of the Hawaii Constitution; and

WHEREAS, if allowed to stand, the current, unconstitutionally constructed plan is prone to adversely affect the political representation of other neighbor islands in subsequent elections and reapportionments because the neighbor islands are likely to experience similarly accelerated rates of population growth; and

WHEREAS, the methodologies for determining a population base of "permanent residents" have been established, used, and unchallenged in the 1983-84, 1991, and 2001 Reapportionments and are legal and effective; and

WHEREAS, the approach taken in the last three reapportionments can be adopted, modified, and extrapolated from by using honest, good faith efforts to abide by the Hawaii Constitution; and

WHEREAS, any relative deficiencies in the 2011 data, when compared to the last three reapportionments, should not be viewed as outright bars to attempting to extrapolate patterns and methodologies from the historical record on districting and reapportionment; and

WHEREAS, the 2011 Reapportionment Commission has not provided any publicly available opinion or statement from an expert to indicate that any deficiencies in the current data warrants completely abandoning all efforts to extract non-permanent residents from the census data; and

WHEREAS, the 2011 Reapportionment Commission has misguidedly prioritized an accurate drawing of Oahu districts over an accurate reapportioning of legislators across the island units; and

WHEREAS, the 2001 Reapportionment Commission had changed its proposed population base to one of permanent residents so that it honored the Hawaii Constitution after it presented its original plan to the public and experienced widespread opposition, permitting Maui County to gain another representative – showing that history may again repeat itself; and

WHEREAS, the deadline to adopt the final map is September 26, 2011; and

WHEREAS, the above-referenced actions, decisions, and failures to act on behalf of the 2011 Reapportionment Commission call into question the integrity of the commission and imply a motive to centralize power on the island of Oahu; now, therefore,

BE IT RESOLVED that the 2011 Reapportionment Commission is requested to consider the legislative intent behind the 1992 amendments; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to uphold their constitutional duty to give meaning to the word "permanent" in reapportionment; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to use the data it has obtained regarding non-permanent populations to first determine what the permissible population base is for the entire state by subtracting the number of non-permanent residents, apportion the appropriate number of legislators per basic island unit, and then work with the existing data and available extraction methodologies to determine where to draw district lines; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to expeditiously make an alternative plan using a population base adjusted for permanent residents and to make that alternative plan available to the public so that the differences between the plans are apparent; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to make all its correspondence with the military, and data that has been provided to them by the military immediately available to the public; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to make all future deliberations over whether to include or exclude non-permanent residents open and available to the public ; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission Technical Committee is requested to make all future deliberations over where to draw district lines open and available to the public ; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to reserve its views on the policy of including or excluding non-permanent residences - which conflict with their constitutional duty - for its Final Report and recommendations for legislative action, without imposing such views upon their reapportionment decision-making; and

BE IT FURTHER RESOLVED that the 2011 Reapportionment Commission is requested to reverse its June 28, 2011 decision to use the U.S. Census data as a population base, and adopt a plan that extracts non-permanent residents, even if that extraction method is imperfect.

2012 Senate Staggered Terms (v3)

Hawaii Reapportionment Commission
September 30, 2011

The commission staff has identified each census block with a designation that it did or did not participate in a regular election for state senator in the 2010 election.

The staff has totaled the population by census block in each new senate district for all census blocks that participated in a regular election for senate in the year 2010.

The staff has identified twelve new senate districts seats which had the smallest populations of participation in the 2010 regular senatorial elections. These twelve new senate districts will be designated by the commission to have two year terms in the 2012 election.

	2010	2010 SE Pop	2012
Senate 1	**no**	**4,551**	**2 years**
Senate 2	YES(P,G)	62,954	4 years
Senate 3	**no**	**0**	**2 years**
Senate 4	YES(P,G)	53,971	4 years
Senate 5	**no**	**0**	**2 years**
Senate 6	**no**	**1,626**	**2 years**
Senate 7	**no**(SV)	**0**	**2 years**
Senate 8	YES(P,G)	52,038	4 years
Senate 9	YES(P,G)	52,162	4 years
Senate 10	YES(P,G)	50,370	4 years
Senate 11	YES(P)	49,722	4 years
Senate 12	**no**	**0**	**2 years**
Senate 13	YES(P,G)	52,582	4 years
Senate 14	YES(P,G)	46,702	4 years
Senate 15	YES(P,G)	53,440	4 years
Senate 16	**no**	**7,575**	**2 years**
Senate 17	**no**	**8,230**	**2 years**
Senate 18	**no**	**12,096**	**2 years**
Senate 19	YES(P,G)	51,591	4 years
Senate 20	YES(P,G)	54,332	4 years
Senate 21	**no**	**3,237**	**2 years**
Senate 22	**no**(SV)	**0**	**2 years**
Senate 23	**no**	**0**	**2 years**
Senate 24	YES(P,G)	30,542	4 years
Senate 25	YES(P,G)	50,444	4 years

2010 Was there a regular senatorial election in this district in 2010?
(P=primary,G=general,SV=special vacancy)

2010 SE Pop 2010 regular senatorial election population in each of the new senate districts

2012 Term length for 2012 senatorial election

HAWAII REAPPORTIONMENT COMMISSION

SENATE STAGGERED TERMS CALCULATIONS v3 (30 Sep 2011)

FROM (2010) TO (2011)	2010 Pop	2010 SE Pop
Senate 1 to Senate 1	54233	0
Senate 2 to Senate 1	4551	4551
2011 Senate 1 total	**58784**	**4551**
Senate 1 to Senate 2	853	0
Senate 2 to Senate 2	62954	62954
2011 Senate 2 total	**63807**	**62954**
Senate 3 to Senate 3	61695	0
2011 Senate 3 total	**61695**	**0**
Senate 4 to Senate 4	53971	53971
2011 Senate 4 total	**53971**	**53971**
Senate 5 to Senate 5	49400	0
2011 Senate 5 total	**49400**	**0**
Senate 4 to Senate 6	1626	1626
Senate 5 to Senate 6	101	0
Senate 6 to Senate 6	49822	0
2011 Senate 6 total	**51549**	**1626**
Senate 7 to Senate 7	67090	0
2011 Senate 7 total	**67090**	**0**
Senate 8 to Senate 8	39714	39714
Senate 25 to Senate 8	12324	12324
2011 Senate 8 total	**52038**	**52038**
Senate 8 to Senate 9	7305	7305
Senate 9 to Senate 9	44857	44857
2011 Senate 9 total	**52162**	**52162**
Senate 9 to Senate 10	3055	3055
Senate 10 to Senate 10	47315	47315
2011 Senate 10 total	**50370**	**50370**
Senate 11 to Senate 11	49722	49722
Senate 12 to Senate 11	1412	0
2011 Senate 11 total	**51134**	**49722**

HAWAII REAPPORTIONMENT COMMISSION

SENATE STAGGERED TERMS CALCULATIONS v3 (30 Sep 2011)

FROM (2010) TO (2011)	2010 Pop	2010 SE Pop
Senate 12 to Senate 12	51948	0
2011 Senate 12 total	**51948**	**0**
Senate 13 to Senate 13	47593	47593
Senate 14 to Senate 13	2951	2951
Senate 15 to Senate 13	2038	2038
2011 Senate 13 total	**52582**	**52582**
Senate 14 to Senate 14	44550	44550
Senate 15 to Senate 14	2152	2152
Senate 16 to Senate 14	6002	0
2011 Senate 14 total	**52704**	**46702**
Senate 15 to Senate 15	53440	53440
2011 Senate 15 total	**53440**	**53440**
Senate 15 to Senate 16	7575	7575
Senate 16 to Senate 16	40661	0
Senate 18 to Senate 16	3764	0
2011 Senate 16 total	**52000**	**7575**
Senate 17 to Senate 17	40340	0
Senate 18 to Senate 17	4172	0
Senate 19 to Senate 17	8230	8230
2011 Senate 17 total	**52742**	**8230**
Senate 18 to Senate 18	41000	0
Senate 19 to Senate 18	5900	5900
Senate 20 to Senate 18	6196	6196
2011 Senate 18 total	**53096**	**12096**
Senate 19 to Senate 19	45567	45567
Senate 20 to Senate 19	6024	6024
2011 Senate 19 total	**51591**	**51591**
Senate 20 to Senate 20	54332	54332
2011 Senate 20 total	**54332**	**54332**
Senate 19 to Senate 21	3237	3237
Senate 21 to Senate 21	49578	0
2011 Senate 21 total	**52815**	**3237**

HAWAII REAPPORTIONMENT COMMISSION

SENATE STAGGERED TERMS CALCULATIONS v3 (30 Sep 2011)

FROM (2010) TO (2011)	2010 Pop	2010 SE Pop
Senate 17 to Senate 22	9518	0
Senate 22 to Senate 22	44060	0
2011 Senate 22 total	**53578**	**0**
Senate 22 to Senate 23	22505	0
Senate 23 to Senate 23	28161	0
2011 Senate 23 total	**50666**	**0**
Senate 23 to Senate 24	19363	0
Senate 24 to Senate 24	30542	30542
2011 Senate 24 total	**49905**	**30542**
Senate 24 to Senate 25	17490	17490
Senate 25 to Senate 25	32954	32954
2011 Senate 25 total	**50444**	**50444**